

IN SEARCH OF THE BEST INTERESTS OF THE CHILD:
THE EFFICACY OF THE COURT APPOINTED SPECIAL
ADVOCATE MODEL OF GUARDIAN AD LITEM
REPRESENTATION

INTRODUCTION

In May 1995, after being removed from his biological family, Lucas's foster parents brought their seven-year-old foster son unconscious to Manatee Memorial Hospital, claiming he had self-inflicted the injuries that eventually killed him.¹ The medical examiner did not believe that Lucas could have inflicted the more than two hundred injuries to his twenty-six pound body, including fractured ribs and scars on his penis or the final lethal blow to his head.² It is difficult to imagine how Lucas, and hundreds of other abused children, must have felt—forced to stay in a situation he did not want to be in; one in which his very life was in danger; one which ultimately resulted in his death.³ But consider the converse, how a child would feel to be forced to leave his family against his wishes, to go live in a “better” situation. Guardians ad litem in juvenile abuse and neglect cases must make very difficult, complicated decisions having life long impact on the children they represent. Given the nature and importance of this role, it is disturbing that many guardians ad litem have very little training or education in children and families, receive little compensation for their work, and often are reported to provide substandard representation to their child clients.⁴ Many courts have appointed individuals as guardians ad litem without requiring prior training that adequately addresses the specific types of

¹ John Gibeaut, *Lucas Deserved Better*, 83 A.B.A. J. 52, Dec. 1997 (describing the abuse of seven-year-old boy removed from his biological family and placed in a foster home, despite concerns about the foster parents).

² *See id.* at 52-53.

³ 1,400 children died because of abuse or neglect in 2002. U.S. Department of Health and Human Services, *Child Maltreatment 2002: Reports from the States to the Nat'l Child Abuse and Neglect Data System 17* (2002). Of those, 76% died before reaching their fifth birthday. *Id.*

⁴ *See* U.S. DEPT. OF HEALTH & HUMAN SERVICES, FINAL REPORT ON THE VALIDATION AND EFFECTIVENESS STUDY OF LEGAL REPRESENTATION THROUGH GUARDIAN AD LITEM 1-1 (1994) [hereinafter FINAL REPORT]; U.S. DEPT. OF HEALTH & HUMAN SERVICES, NAT'L STUDY OF GUARDIAN AD LITEM REPRESENTATION (1990) [hereinafter NAT'L STUDY]; U.S. DEPT. OF HEALTH & HUMAN SERVICES, CSR, INC., NAT'L EVALUATION OF THE IMPACT OF GUARDIANS AD LITEM IN CHILD ABUSE OR NEGLECT JUDICIAL PROCEEDINGS (1988) [hereinafter NAT'L EVALUATION].

responsibilities they will undertake.⁵ In such situations, the legal system's protection of children may suffer.

"Guardian ad litem" ("GAL") has been defined as "a guardian, usually a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party."⁶ The traditional guardian ad litem role requires counsel to represent the assigned juvenile throughout the proceedings and make a recommendation to the court after determining what is in the best interests of the child.⁷

The models of guardian ad litem representation that this article will analyze are the private attorney model, the staff attorney model, and the Court Appointed Special Advocate ("CASA") model.⁸ Of these several different models, the one that stands out above the rest is that of the Court Appointed Special Advocate.⁹ The CASA model, in which trained lay volunteers provide advocacy for abused and neglected children, has been consistently evaluated as the most effective at advocating the best interests of the child and the most successful at procuring a safe and permanent home for the child in the shortest time possible.¹⁰ Whether acting in conjunction with a program attorney, in addition to an independent guardian ad litem attorney, or as the child's sole guardian ad litem, the CASA volunteer has raised the bar for acceptable standards in child representation and provided

⁵ Administration for Children and Families, U.S. Department of Health and Humans Services, POLICIES REGARDING THE NEW PRE-APPOINTMENT TRAINING REQUIREMENT FOR GUARDIANS AD LITEM, TECHNICAL ASSISTANCE BULLETIN, 1 (2004) [hereinafter TECHNICAL ASSISTANCE BULLETIN].

⁶ BLACK'S LAW DICTIONARY 313 (Second Pocket Edition 2001).

⁷ Cindy Callahan & Vince Wills, *Searching for Answers About the Role of the Guardian Ad Litem*, 36 JUN MD. B.J. 46, 49 (2003).

⁸ In the private attorney model, the court appoints an attorney in private practice to represent a child and provides the attorney compensation. In the staff attorney model, the court or city employs a staff of attorneys directly or through contracts with either law firms or the public defender's office. In the CASA model, trained lay volunteers provide advocacy for children. NAT'L EVALUATION, *supra* note 4, at 1-2. "CASA programs vary based on the standing the volunteers are given in court and their relationships to other professionals appointed to represent the child. In some counties CASAs work in tandem with private attorneys. Under such an arrangement, a volunteer may function as the GAL, as the co-GAL with the attorney, or as an assistant to the attorney who is the GAL." FINAL REPORT, *supra* note 4, at 4-4. CASA volunteers advocate for the child but must not practice law. National standards, however, require that the program have access to legal counsel. E-mail from Carmela Welte, Deputy Chief Executive Officer, Nat'l CASA Ass'n, to Hollis Peterson, Student, George Mason Univ. School of Law (Jan. 8, 2005 08:10 CST) (on file with author).

⁹ See NAT'L EVALUATION, *supra* note 4, at 18 (stating "[t]he CASA Models clearly excelled as a method of GAL representation").

¹⁰ *Id.* (stating "CASAs were highly rated by professional respondents and outshone the other models on the quantitative best interest outcome measure").

a solution to the nationwide problem of the often poor performance of court appointed legal counsel for children.¹¹

Part I of this article traces the history of the child advocacy movement, from the origins of children's rights through the most recent developments. Part II then discusses the various roles of the guardian ad litem in abuse and neglect cases and their use of the "best interests" standard in court recommendations. Part III reviews the effectiveness of the various models of guardian ad litem representation, discusses the problematic absence of quality legal representation in some of these models, and emphasizes the need for comprehensive adoption of the CASA model. Part IV then provides essential information to assist guardians ad litem without the benefit of a CASA in understanding and communicating with children and families and considering problems of confidentiality. Finally, Part V offers strategies to guardians ad litem to help mitigate the detrimental effects of the adversary system on children.

I. A HISTORY OF THE CHILD ADVOCACY MOVEMENT

In order to understand fully the present state of today's juvenile courts and the problems that plague them, it is important to review the history of our nation's child advocacy movement. An in-depth analysis of this fluid field of law and the unique set of tribulations it presents will allow for a more efficient approach to problem solving. In addition, it will provide a solid foundation for advocates and legislators alike to argue persuasively for further reform efforts.

A. *The Development of Children's Legal Rights*

Historically, our society has failed to recognize children as persons or accord them rights under the law.¹² Children were viewed as the property of the head of the family, usually the father, who literally had the power of life

¹¹ *Id.* (stating "[d]ue to these factors—thorough case investigation, independence of viewpoint, monitoring of the case, positive relationships with the child and assistance in securing needed services—we give the CASA models our highest recommendation").

¹² CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY 27, (Robert H. Bremner, ed., 1970) (noting that in 1642, Sir Robert Filmer from the Massachusetts Bay Colony compared a father's control over his family to that of a king ruling his kingdom). *See also* Marvin Ventrell, *Rights & Duties: An Overview of the Attorney-Child Client Relationship*, 26 LOY. U. CHI. L.J. 259, 262 (1995) (describing the origins of juvenile law).

and death over them.¹³ Absolute parental control over children was almost unquestioned,¹⁴ and until the nineteenth century, no formal legal system existed to protect children from abuse and neglect.¹⁵

The industrialization of the United States in the nineteenth century moved children into the work place, which created the need for social reform in order to protect children from the effects of the industrial revolution and resulted in the passage of child labor laws.¹⁶ Despite these early attempts to keep children safe from society, the law did very little to protect children from their own parents.¹⁷ Abandonment, beatings, and other forms of severe physical discipline were common practice,¹⁸ but late in the nineteenth century, the mistreatment of one little girl led to the first real advances in the child advocacy movement.

The case of Mary Ellen took place in 1874 and is one of the first documented cases of child abuse in the United States.¹⁹ Mary Ellen was an eight-year-old orphan girl living with adoptive parents in New York City.²⁰

¹³ Barbara B. Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1777 (1993) [hereinafter *Hatching*] (discussing the "ancient tradition of patriarchal ownership of children").

¹⁴ Barbara B. Woodhouse, "Who Owns the Child?"; *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1044 (1992) [hereinafter *Who Owns*] (stating that under Roman law, children and women were private property and men ruled sovereign over their families).

¹⁵ ROBERT M. HOROWITZ, LEGAL RIGHTS OF CHILDREN 1, § 1.02 (1984) (noting the court's refusal to interfere in family relationships in order to protect children from abuse or neglect until the nineteenth century).

The preface to LEGAL RIGHTS OF CHILDREN begins as follows:

A nation may be judged by many standards, but one of the most telling is the treatment of its children and the status they hold in society. Grace Abbott, former head of the United States Children's Bureau, once wrote that "the progress of a state may be measured by the extent to which it safeguards the rights of its children." Although we profess to love children, is this merely an abstraction, or are we truly, as some have said, a child-centered civilization? Are our children adequately nurtured and sheltered from harm, or do we constantly expose them to maltreatment, exploitation and needless danger? Are children accorded rights and benefits worthy of their citizenship, or do we, to their detriment, too freely exercise parental prerogatives and proclaim the incapacities of youth?

¹⁶ *Id.* at 3-4 (describing deplorable working conditions in factories and the resulting passage of statutory regulations).

¹⁷ See CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY, *supra* note 12, at 40-42 (describing several cases where courts discussed when parents exceed their parental privileges and noting that criminal conviction of the parent was possible only when the parent permanently damaged the child and that such prosecutions punished the parents but did nothing to protect the child).

¹⁸ See VINCENT DEFRANCIS & CARROLL LUCHT, CHILD ABUSE LEGISLATION IN THE 1970'S 1-19 (rev. ed. 1974) (tracing the origins of the child advocacy movement).

¹⁹ NAT'L COURT APPOINTED SPECIAL ADVOC. ASS'N, N.C. GUARDIAN AD LITEM VOLUNTEER TRAINING CURRICULUM VOLUNTEER MANUAL, 2-30 (Mary Gratch ed., 2001), available at <http://www.nccourts.org/Citizens/GAL/Workbook.asp> (describing the events leading to development of the Child Protective Services agency).

²⁰ *Id.* at 2-5.

She was beaten, locked in a room, rarely allowed outside, and was not given adequate food or clothing.²¹ A neighbor appealed to a mission worker to help the child, but the mission worker could find no one to intervene; the police had no grounds because no crime was being committed, and the agencies would not get involved because they did not have legal custody.²² An appeal was finally made to Henry Bergh, the founder and president of the Society for the Prevention of Cruelty to Animals.²³ Bergh took up her case and with the help of his attorney, Elbridge Gerry, successfully petitioned the court to remove Mary Ellen from the people who had mistreated her.²⁴ After an outpouring of public concern for abused children, within one year Bergh and Gerry established the Society for the Prevention of Cruelty to Children, which was the first public agency dedicated solely to protecting children from abuse and neglect.²⁵

Shortly thereafter, in the early twentieth century, American juvenile courts began to appear as a product of the *parens patriae* doctrine, whose origins are traced back to English law when King Edward began to claim wardship over children whose fathers had died or become incapacitated, particularly those children with large estates.²⁶ This development was based on the concept that the King, as the father of the country, had a duty to protect the welfare of his infant citizens, but received criticism because, in practice, it protected only children with property.²⁷ This rationale, meaning literally “parent of the country,” gave the government standing to prosecute a lawsuit on behalf of citizens unable to care for themselves.²⁸ The concept marked the beginning of societal recognition that the legal system might need to interfere with the family relationship in order to protect the safety of children.²⁹

Then in the middle of the twentieth century, two developments occurred that sparked the evolution of child abuse and neglect laws in the

²¹ *Id.* at 2-6.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ NAT'L COURT APPOINTED SPECIAL ADVOC. ASS'N, *supra* note 19, at 2-6.

²⁶ See generally Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195 (1978) (discussing the history of the doctrine of *parens patriae*). This doctrine maintains that the government, like a parent, has a general responsibility for the welfare of its infant children and a resulting duty to act to protect that welfare when there is a reason to believe that natural parents will not do so.

²⁷ See George Curtis, *The Checkered Career of Parens Patriae*, 25 DEPAUL L. REV. 895 (1976) (arguing that since children without property were not usually provided guardians, the King's motivation was financial, not protective).

²⁸ BLACK'S LAW DICTIONARY 511 (Second Pocket Edition 2001).

²⁹ See Custer, *supra* note 26, at 207-08.

United States: societal recognition of child abuse and judicial recognition of children's rights. Medical attention to the problem of abused children, aided by the invention of the x-ray in 1910, further alerted society to children's need for protection.³⁰ Then in 1962, Dr. C. Henry Kempe's term "battered child syndrome" captured public attention and led to awareness of the true scope and breadth of child abuse.³¹ With leadership from the medical profession, legislative action followed and by 1965, every state had enacted a child abuse reporting law.³²

The child advocacy movement gained further ground when, in the landmark 1967 decision of *In re Gault*, the Supreme Court finally recognized children's rights to protection as afforded by the United States Constitution, declaring that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."³³ In that case, an Arizona juvenile court committed a fifteen-year-old to the state industrial school after an informal proceeding without affording him notice of charges, counsel, the opportunity to confront and cross-examine his accuser, or protection from self-incrimination.³⁴ The Court rejected the juvenile court system's *parens patriae* approach, which reasoned that children could be denied procedural rights because they had no right to liberty, only custody.³⁵ The Supreme Court held that juvenile delinquency proceedings must meet Fourteenth

³⁰ NAT'L COURT APPOINTED SPECIAL ADVOC. ASS'N, *supra* note 19, at 2-7 (noting that detection of bone fractures and internal injuries by medical professionals significantly increased awareness of child abuse).

³¹ C. Henry Kempe et al., *The Battered Child Syndrome*, 181 JAMA 17 (1962) (discussing characteristics of injuries inflicted on battered children, linking the trauma to abuse and neglect by parents). Dr. Kempe studied suspicious injuries to children with the help of pediatricians and radiologists, such as spiral breaks that could only be caused by abuse. *Id.*

³² NAT'L COURT APPOINTED SPECIAL ADVOC. ASS'N, *supra* note 19, at 2-7.

³³ *In re Gault*, 387 U.S. 1, 13 (1967) (proceeding on appeal from a judgment of the Supreme Court of Arizona, 99 Ariz. 181, 407 P.2d 760, affirming dismissal of petition for writ of habeas corpus filed by parents to secure release of their 15-year-old son who had been committed as juvenile delinquent to state industrial school).

³⁴ *Id.* at 4-8. The United States Supreme Court, through Mr. Justice Fortas, held that a juvenile has right to notice of charges, to counsel, to confrontation and cross-examination of witnesses, and to privilege against self-incrimination.

³⁵ *Id.* at 17.

The right of the state, as *parens patriae*, to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right 'not to liberty but to custody.' He can be made to attend to his parents, to go to school, etc. If his parents default in effectively performing their custodial functions--that is, if the child is 'delinquent'--the state may intervene. In doing so, it does not deprive the child of any rights, because he has none. It merely provides the 'custody' to which the child is entitled. On this basis, proceedings involving juveniles were described as 'civil' not 'criminal' and therefore not subject to the requirements which restrict the state when it seeks to deprive a person of his liberty.

Amendment Due Process requirements³⁶ and unequivocally recognized children as persons under the Constitution.³⁷

Following the *Gault* decision, the problem of child abuse drew congressional attention when the Senate Subcommittee on Children and Youth investigated the issue.³⁸ Committee members visited hospitals, met young victims of abuse, and found their stories moving.³⁹ As a result, in 1974, Congress enacted the Child Abuse Prevention and Treatment Act (“CAPTA”), which created the National Center on Child Abuse and Neglect and earmarked federal funds for states to establish special programs for child victims of abuse or neglect.⁴⁰ This law requires that states: have child abuse and neglect reporting laws; investigate reports of abuse and neglect; educate the public about abuse and neglect; maintain the confidentiality of child protective services records; and *provide a guardian ad litem to every abused or neglected child whose care results in a judicial proceeding*.⁴¹ “The rationale of the appointment of a guardian ad litem in civil and criminal abuse and neglect proceedings was that each child involved in judicial proceedings needs an independent voice to advocate for his/her ‘best interests.’”⁴²

³⁶ *Id.* at 30-31.

³⁷ *Id.* at 79.

In the last 70 years many dedicated men and women have devoted their professional lives to the enlightened task of bringing us out of the dark world of Charles Dickens in meeting our responsibilities to the child in our society. The result has been the creation in this century of a system of juvenile and family courts in each of the 50 States. There can be no denying that in many areas the performance of these agencies has fallen disappointingly short of the hopes and dreams of the courageous pioneers who first conceived them. For a variety of reasons, the reality has sometimes not even approached the ideal, and much remains to be accomplished in the administration of public juvenile and family agencies—in personnel, in planning, in financing, perhaps in the formulation of wholly new approaches.

³⁸ Bridget A. Blinn, *Focusing on Children: Providing Counsel to Children in Expedited Proceedings to Terminate Parental Rights*, 61 WASH. & LEE L. REV. 789, 811 (2004) (noting that the federal legislative response to child protection has been far more child-centered than the Supreme Court’s response).

³⁹ *Id.* at 811 (describing the reaction of Senators to their visits to hospitals to meet victims of child abuse).

⁴⁰ Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, 88 Stat. 4 (codified as amended at 42 U.S.C. §§ 5101-5107, 5116, 5118 (2000)).

⁴¹ § 4(b)(2), 88 Stat. at 6 (current version at 42 U.S.C. § 5106a (2000)) (listing CAPTA’s requirements).

⁴² FINAL REPORT, *supra* note 4, at 1-2 (discussing the rationale for appointment of a guardian ad litem).

B. *The Emergence of the Court Appointed Special Advocate Model*

Congress mandated the use of guardians ad litem in abuse and neglect cases in 1974, but the statute was silent on who could be appointed as the guardian ad litem. In 1996, Congress amended CAPTA to specify that the guardian ad litem may be an attorney or a Court Appointed Special Advocate (“CASA”), a trained community volunteer who advocates for the best interests of children who come into the court system as a result of abuse or neglect.⁴³ Since that time, the use of CASA volunteers has steadily increased and, though they are still not available in every judicial district, the National CASA Program has earned a prominent place in the modern child advocacy movement.⁴⁴

The CASA model was born in the courtroom of Seattle Superior Court Judge David Soukup.⁴⁵ To ensure he was getting all the facts and the long-term welfare of each child was being represented, Judge Soukup came up with an idea that would change America’s judicial procedure and the lives of over a million children.⁴⁶ He obtained funding to recruit and train community volunteers to step into courtrooms on behalf of the children.⁴⁷ Seattle implemented this unique concept as a pilot program in 1977 which resulted in replication in courts across the country.⁴⁸ By 1982, it was clear that a national association was needed to direct CASA’s emerging national presence, and the National Court Appointed Special Advocate Association was formed.⁴⁹ In 1989, the American Bar Association officially endorsed the use of CASA volunteers to work with attorneys to speak for abused and neglected children in court and in 1996, Congress authorized the expansion of the CASA program by amending CAPTA to include CASA volunteers as guardians ad litem.⁵⁰

As CAPTA’s reporting programs began to take effect and states received more reports of child abuse, states removed more children from their homes and placed them in foster care.⁵¹ The state systems were not

⁴³ Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, § 107(b)(2)(A)(ix), 110 Stat. 3063, 3073 (codified as amended at 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000)).

⁴⁴ Telephone Interview with Carmela Welte, Deputy CEO, Nat’l CASA Program (July 13, 2004).

⁴⁵ *History of CASA* (2003), <http://www.casenet.org>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See Susan Mangold, *Extending Non-Exclusive Parenting and the Right to Protection for Older Foster Children*, 48 BUFF. L. REV. 835, 853 (2000) (“Following the passage of CAPTA, the number of

equipped to handle the influx of abused children into their foster care programs⁵² and consequently, children spent years in the system shifting from foster home to foster home while agencies attempted to provide the services necessary to enable safe family reunification.⁵³ An influential book published in the mid 1970s, *Beyond the Best Interests of the Child*, publicized the theory of psychological parenthood, which recognizes that a strong emotional bond exists between a child and a non-biological parent who either lives with or significantly cares for the child, and harshly criticized the removal of children from their parents.⁵⁴ As a result, Congress became concerned about states unnecessarily removing children from their homes, and passed legislation to encourage reunification efforts.⁵⁵ Seven years after CAPTA, Congress enacted the Adoption Assistance and Child Welfare Act, which is a blueprint for combined efforts of the judicial, executive, and legislative branches of government to preserve families and, if necessary, build new families for children.⁵⁶ It requires that states recruit culturally diverse foster and adoptive families; provide reasonable efforts to prevent or eliminate the need for removal of the child from his home or to make it possible for the child to return to his home; establish standards for foster family homes and review the standards periodically; set goals and a plan for the number of children in foster care; and have a data collection and reporting system about the children in care.⁵⁷

Unfortunately, Congress's demand for reunification had not adequately focused on the needs of children in the care of state agencies. Stories of the deaths of children placed in foster care or returned to their biological parents, despite child welfare agencies having received notice of their dangerous situations, became public and raised the urgency of reform

children reported as abused and neglected exploded, and state-based foster care systems were flooded with children placed as a result of reporting and investigation through child protective services.”)

⁵² See *id.* (describing the increase in children in the foster care system and the inadequacy of state systems to find permanent placements for that influx).

⁵³ See Libby Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. ON LEGIS. 1, 2 (2001) (describing “foster care drift” as “the shepherding of children through a series of foster homes” and describing it as “insensitive to children’s sense of time and threatening to their future ability to form attachments”).

⁵⁴ See JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 17-20 (1973) (describing the impact of separation from psychological parents on children and the importance of attachment).

⁵⁵ Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 471(a)(15), 94 Stat. 500, 503 (codified as amended at 42 U.S.C. § 671(a)(15) (2000)) (requiring states to make “reasonable efforts” to protect and assist biological families). AACWA included financial incentives for states to emphasize reunification. *Id.* at § 670.

⁵⁶ Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.).

⁵⁷ 42 U.S.C. § 671 (2000).

efforts.⁵⁸ In response, Congress passed the Adoption and Safe Families Act in 1997, which embodied three key principles: the safety of children is the paramount concern; foster care is a temporary setting and not a place for children to grow up; and permanency planning should begin as soon as the child enters foster care.⁵⁹ The Adoption and Safe Families Act is the guiding law that directs the time lines under which the child welfare system currently operates.⁶⁰

The foster care system received further intensive analysis when the Pew Commission released a report in May 2004.⁶¹ The Commission's charge was to improve outcomes for children in the foster care system, particularly to expedite the movement of children from foster care into safe, permanent, nurturing families, and prevent unnecessary placements.⁶² This report identified a number of recommendations for reforming court oversight of child welfare cases, one of which was for Congress to appropriate \$5 million to expand the CASA program into communities where there are high unmet needs of children.⁶³ The Committee also recognized that limited training for judges and attorneys contributed to confusion within the field and recommended requiring such judges and attorneys to complete a multi-disciplinary training program and participate in ongoing training throughout their careers.⁶⁴

⁵⁸ See, e.g., RICHARD GELLES, *THE BOOK OF DAVID* (1996) (telling the story of a boy whom the state allowed to remain in his mother's abusive home, where she suffocated him); *DeShaney v. Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189, 192-195 (1989) (recounting the facts of the case, in which a four-year-old boy was returned to his abusive father and subsequently beaten so severely by his father that he suffered permanent brain damage sufficient to confine him for life to an institution for the profoundly retarded).

⁵⁹ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

⁶⁰ Blinn, *supra* note 38, at 815-16 (stating that the swift timetable for commencement of termination proceedings under ASFA illustrates the legislature's preference for adoption).

⁶¹ THE PEW COMMISSION, *FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE* (2004) [hereinafter *Pew Commission*]. The Pew Commission was launched in May 2003 with the support of Pew Charitable Trusts to the Georgetown University Public Policy Institute. *Id.* at 10.

⁶² Carmela Welte, *Pew Commission Releases Recommendations*, COURT APPOINTED SPECIAL ADVOC. CONNECTION (Summer 2004).

⁶³ Pew Commission, *supra* note 61, at 43. "The Strengthening Abuse and Neglect Courts Act (SANCA) authorized \$5 million to expand the CASA program, both by extending it into new communities and by building the capacity of existing programs to serve more children in their community. However, Congress has never appropriated these funds. The Pew Commission urges Congress to do so. . . . We further urge states and private organizations . . . to join Congress as partners in this important effort to expand the program into underserved jurisdictions." *Id.*

⁶⁴ *Id.* at 43-44. The Commission also recommends that law schools develop and expand course offerings and clinical internships that enable students to gain expertise in dependency law. *Id.* at 44.

This recommendation is in accord with the 2003 amendment to the Child Abuse and Prevention Act requiring that guardians ad litem and CASA volunteers receive “training appropriate to the role.”⁶⁵ The Administration for Children and Families (“ACF”), a division of the United States Department of Health and Human Services, issued technical assistance guidance to states for implementing the 2003 amendments.⁶⁶ The ACF guidance states that “CAPTA was amended to ensure higher quality representation and to bar appointment of untrained or poorly trained court-appointed representatives for children.”⁶⁷ The guidance continues:

[t]he volunteer curricula developed by the National CASA Association provides a model for training of CASA volunteers before they begin to receive appointments by the court on behalf of individual children. States should consider offering training for lay volunteer CASA or GAL equivalent to that specified in the National CASA Association curricula.⁶⁸

According to ACF, by June 25, 2004, “there should be no appointment of a GAL for a child who has not, before their appointment, received appropriate training that is specifically related to their role as the child’s court-appointed representative.”⁶⁹ The ACF’s endorsement of the CASA training curricula is further evidence of the program’s widespread acceptance and success.

A review of the history of the child advocacy movement in the United States shows that our society is still relatively new to the concept of protecting the interests of children through the legal system and developing appropriate systems, methods, and programs to cope with the problems children in the legal system face. As this field of law continues to develop, our nation must appreciate the importance of quality legal representation

⁶⁵ CAPTA Amendments of 2003, 117 Stat. 800, 810 (to be codified at 42 U.S.C. § 5106a(b)(2)(A)(xiii)). The CAPTA requirement as just amended specifies that in order for states to be eligible for a CAPTA state grant, the state must have in effect and be enforcing a state law requiring that in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem “who has received training appropriate to the role,” who may be an attorney or a court appointed special advocate, be appointed to represent the child in such proceedings. *Id.*

⁶⁶ TECHNICAL ASSISTANCE BULLETIN, *supra* note 5, at 2.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 1 (emphasis omitted). In many states, the training requirements for attorney guardians ad litem are substantially less than the training requirements for CASA volunteers. In Virginia, for example, guardians ad litem must be active members of the Virginia State Bar, obtain certification after only seven hours of MCLE training, and require just six hours of continuing education biennially. <http://www.courts.state.va.us/1/cover.htm>. CASA volunteers, however, receive thirty hours of initial training and are required to participate in twelve hours of continuing education every year. <http://www.casafairfax.org/main.asp?id=5>.

for children and continue to explore and define what is in the “best interests” of the child.

II. THE BEST INTERESTS STANDARD AND THE ROLE OF THE GUARDIAN AD LITEM

Guardian ad litem appointments in juvenile court have received wide acceptance and approval from both attorneys and judges.⁷⁰ Despite this, the precise functions to be performed by guardians ad litem are not usually defined clearly in legislation, and courts and legislators have assigned a wide variety of often conflicting tasks to be performed by guardians.⁷¹ The guardian ad litem may undertake activities such as meeting with and interviewing the parties, neighbors, friends, relatives, teachers, physicians, psychologists, or any professional who has a relationship with the child.⁷² The guardian ad litem may also file pleadings, request evaluations, obtain relevant documents, and testify in court.⁷³ Frequently the guardian ad litem, as an unbiased party, is able to initiate discussions between the parties and help the family or participating agencies reach a settlement.⁷⁴ The guardian ad litem is often asked by the court to ensure the parties' compliance with court orders and to continue to monitor the case for a given period of time.⁷⁵ Above all, the guardian ad litem's primary duty is to conduct an impartial investigation of the case, make an independent assessment, and render a report or recommendation to the court, which is frequently very influential

⁷⁰ HOROWITZ, *supra* note 15, at 248-51 (discussing a survey of guardian ad litem use and issues in divorce and custody cases and reporting that both judges and attorneys approved of and recommended use of GALs). It should be noted, however, that CASA volunteers are not appointed in divorce or custody cases unless there is an allegation of abuse or neglect.

⁷¹ Roy T. Stuckey, *Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 *FORDHAM L. REV.* 1785, 1786-87 (1996) (noting state-to-state differences in the statutory definitions of the role of the guardian ad litem and arguing that society's interests would be better served if we view GALs as surrogate parents and reconsider their roles and relationships from this perspective).

⁷² Callahan & Wills, *supra* note 7, at 52-53 (describing the role and responsibilities of the traditional guardian ad litem).

⁷³ NAT'L COURT APPOINTED SPECIAL ADVOC. ASS'N, *supra* note 19, at 8-13. When appointed to a case, the GAL receives an appointment order allowing her to access any documents she feels are relevant to investigation of the case, including educational, medical, psychiatric, and Department of Social Service records for both the child and the parent. *Id.* at 13-15.

⁷⁴ *Id.* Since the GAL advocates for the child, rather than one of the opposing parties, she is often received with less hostility and able to act as a negotiator as well as a fact finder.

⁷⁵ *Id.* at 1-17.

in the court's determination.⁷⁶ The recommendations that guardians ad litem make in juvenile or family court cases are based on the "best interests" standard⁷⁷ and should be carefully examined by the court and parties to the action.⁷⁸

Some states provide a list of factors for the court to consider when determining the best interests of the child,⁷⁹ while others leave the determination of which factors are material to the discretion of the court.⁸⁰ Whether the factors to be considered in determining the best interests of the child are provided by statute or determined by the judge, courts make decisions on

⁷⁶ Callahan & Wills, *supra* note 7, at 49 (citing the GAL's primary duty as making a determination and recommendation after pin pointing what is in the best interests of the child).

⁷⁷ Jean Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1505, 1513 (1996) (identifying the roles of best interests in lawyering for children). See also Donald Duquette, *Child Protection Legal Process: Comparing the United States and Great Britain*, 54 U. PITT. L. REV. 239, 279 (1992) (noting that best interests remain the most common standard for dispositional orders despite widespread dissatisfaction with the standard's subjectivity).

⁷⁸ Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL'Y REV. 267, 269-73 (1987) (explaining the best interests standard with an analysis of the areas of weakness of this standard). The author argues that the best interests standard is vague and may be subject to misuses by judges and parents. *Id.* at 270.

⁷⁹ North Dakota's statute, for example, sets forth the following factors to be considered by the court in determining the best interests of the child:

- (1) The love, affection and other emotional ties existing between the parents and child.
- (2) The capacity and disposition of the parents to give the child love, affection, and guidance and to continue the education of the child.
- (3) The disposition of the parent to provide the child with food, clothing, medical care, and other material needs.
- (4) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.
- (5) The permanence, as a family unit, of the existing or proposed custodial home.
- (6) The moral fitness of the parents.
- (7) The mental and physical health of the parents.
- (8) The home, school and community record of the child.
- (9) The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding and experience to express a preference.
- (10) The existence of domestic violence. If the court finds that domestic violence has occurred, the court shall provide a custody arrangement that best protects the child and other family member who is the victim of domestic violence from any further harm.
- (11) The interaction and relationship of the child with any person who resides in, is present, or frequents the household of a parent and who may significantly affect the child's best interests. The court shall consider that person's history of inflicting physical harm, bodily injury, or assault on other persons.
- (12) Any factors considered by the court to be relevant to a particular child custody dispute.

N.D. Cent. Code § 14-09-06.2 (2004) (defining type of proceeding and role of the guardian ad litem as representative of the child's best interests).

⁸⁰ See Charlow, *supra* note 78, at 273-75 (noting lack of consistency in factors used by each state in determining the best interests of the child).

an individual case-by-case basis, and statutes do not establish the weight to be accorded to any particular factor.⁸¹

The guardian ad litem's dichotomous role as a champion of the child's best interests and of the child's wishes is widely analyzed and discussed.⁸² Traditionally, the primary responsibility of the guardian ad litem is to the court, so the guardian ad litem is not bound by the desires of the child. But in a case where the child's best interests and the child's expressed wishes differ, the guardian ad litem may ask the court's advice by requesting clarification of the scope of their appointment and, if necessary, petition the court for a divisible role.⁸³

If the court is unable to divide the role, the guardian ad litem should make a recommendation based on the child's best interests while informing the court of the child's wishes and noting that not all children are competent to determine what is in their own best interests.⁸⁴ The child's safety is always the primary concern, but the psychological impact of separating a child from his parent against his will must be duly considered. The overwhelming sense of loss that children feel when forcibly removed from a parent can sometimes be far worse to children than the abuse or neglect that they have experienced in their lives.⁸⁵ Despite the weight of the child's wishes, ultimately, the decision lies with the court and the guardian ad litem is obligated to provide all relevant information in order to assist the court with that decision.⁸⁶ This obligation, however, can put the guardian in

⁸¹ *Id.* at 279-80 (noting that even when states provide statutory guidance in establishing which factors should be considered in determining the best interests of the child, they do not assign any weight to individual factors).

⁸² See J. GOLDSTEIN, *IN THE BEST INTERESTS OF THE CHILD* 122 (1986) (noting that GALs may not be able to advocate for both the child's best interests and wishes when those two positions differ). See also *S.S. v. D.M.*, 597 A.2d 870, 877 (D.C. 1991) ("The definition of the precise roles of the attorney and the guardian ad litem of children is still evolving and not without difficulty."); *Leary v. Leary*, 627 A.2d 30, 37 (Md. Ct. Spec. App. 1993) ("A dichotomy exists between the attorney as guardian and the attorney as advocate, and the lines become very easily blurred.")

⁸³ Tara Lee Mulhauser, *From "Best" to "Better"; The Interests of Children and the Role of a Guardian Ad Litem*, 66 N.D. L. Rev. 633, 638 (1990) (stating that if an attorney feels there is a conflict between his role as attorney and his role as GAL, he should petition the court for an order allowing him to withdraw as guardian).

⁸⁴ *Leary*, 627 A.2d at 37 (noting that younger or incompetent children cannot determine what is in their best interests and that the traditional GAL is not bound by the desires of the child when making a recommendation to the court).

⁸⁵ NAT'L COURT APPOINTED SPECIAL ADVOC. ASS'N, *supra* note 19, at 5-28 (discussing the importance of family to a child).

⁸⁶ Callahan & Wills, *supra* note 7, at 49 (describing the attorney's responsibility to the court).

conflict between her duty to the court and her desire to respect the child's requests for confidentiality.⁸⁷

Because the role of the guardian ad litem and the best interests standard both contain incongruous and contradictory elements, there remains a pervasive lack of clarity as to what makes guardians effective and what standards should be used in evaluating their performance.⁸⁸ Several commentators have suggested that this disparity and confusion has led to attorneys failing to fulfill their professional responsibilities, providing erroneous representation, and ultimately harming their child clients.⁸⁹ In the search for solid empirical data on the subject, a series of studies have been conducted assessing the quality of legal representation for children.

III. STUDIES ON THE EFFECTIVENESS OF GUARDIANS AD LITEM: AN ARGUMENT FOR ADOPTION OF THE COURT APPOINTED SPECIAL ADVOCATE MODEL

Given the lack of clarity concerning the guardian ad litem's role and the best interests standard, it is not surprising that evaluations of attorneys representing children either as independent counsel or as guardians ad litem "have not been favorable."⁹⁰ Researchers have identified both systemic and individual attorney problems that have contributed to the poor representation of children.⁹¹ Systemic issues leading to problems in the representation

⁸⁷ See discussion *infra* Part V; David Katner, *Confidentiality and Juvenile Mental Health Records in Dependency Proceedings*, 12 WM. & MARY BILL RTS. J. 511 (2004) (noting that numerous children are required to divulge the most intimate details of their lives only to have those disclosures revealed in court proceedings).

⁸⁸ Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106, 112 (2002) (raising concerns about the use of guardians ad litem).

Judges differ in how they use guardians ad litem. In some cases, guardians simply gather information and present recommendations to the court. In other cases, guardians may act as custody evaluators, or visitation expeditors. Judges, court administrators and guardians do not always agree on what constitutes the guardians' responsibilities. Judges also differ in their expectations of guardians for communicating and reporting. People told us the multiplicity of the guardian roles can be confusing, especially for parents who may not always understand why guardians were appointed.

Id. at 112-13 (citations omitted).

⁸⁹ Robert Kelly & Sarah Ramsey, *Do Attorneys for Child Protection Proceedings Make a Difference? - A Study of the Impact of Representation Under Conditions of High Judicial Intervention*, 21 J. FAM. L. 405, 411-416 (1983) [hereinafter Kelly & Ramsey, *Impact*]; Robert E. Shepherd, "I Know the Child Is My Client, But Who Am I?," 64 FORDHAM L. REV. 1917, 1934 (1996).

⁹⁰ Robert Kelly & Sarah Ramsey, *Monitoring Attorney Performance and Evaluating Program Outcomes: A Case Study of Attorneys for Abused and Neglected Children*, 40 RUTGERS L. REV. 1217, 1219 (1988) [hereinafter Kelly & Ramsey, *Monitoring*].

⁹¹ *Id.* at 1219. See also FINAL REPORT, *supra* note 4; NAT'L EVALUATION, *supra* note 4; NAT'L STUDY, *supra* note 4.

of children include: unavailability of training or consultation for inexperienced attorneys, the appointment of different attorneys for the same child at different hearings, delayed attorney appointments, low rate of compensation for attorneys, and a shortage of attorneys willing to represent children.⁹² Problems involving individual attorney performance include: “inadequate investigation, lack of contact with the child, lack of knowledge of the applicable law, and lack of specialized training.”⁹³

A 1983 study of attorney guardians ad litem representing children in North Carolina concluded that the attorneys were ineffective and even tended to substantially delay a child’s return home.⁹⁴ A survey of court records revealed that the attorneys spent an average of five hours per case, including court time, and rarely followed their cases after the dispositional hearing.⁹⁵ The attorney guardians ad litem typically agreed with the local Department of Social Services’ recommendations in 88% of the cases, leading the authors to conclude that they were simply a presence, rather than an influence, in the courtroom.⁹⁶ The authors noted that “[t]his kind of system gives the illusion that abused and neglected children have their own advocate when in fact they do not.”⁹⁷

A New York Bar Association study of lawyers appointed to represent children as law guardians in delinquency and other cases also concluded that many of them were ineffective.⁹⁸ The researchers established several basic criteria of effectiveness: the guardian must “meet the client, be minimally prepared, have some knowledge of the law, and be active on behalf of his or her client.”⁹⁹ Using these criteria, the study determined that 45% of the observed representation was seriously or marginally inadequate.¹⁰⁰ In addition, the guardians described themselves as having little experience or training, and reported that they were unclear about their role.¹⁰¹

⁹² Kelly & Ramsey, *Monitoring*, *supra* note 90, at 1219; NAT’L STUDY, *supra* note 4, at 14-15. See also NAT’L EVALUATION, *supra* note 4, at 18 (“The major reason for the poor performance of private attorneys appears to be lack of adequate compensation. The private attorney GALs were minimally compensated, receiving far less than needed to make a living and often not paid for all the hours they devoted to a case.”).

⁹³ Kelly & Ramsey, *Monitoring*, *supra* note 90, at 1219.

⁹⁴ Kelly & Ramsey, *Impact*, *supra* note 89, at 407.

⁹⁵ *Id.* at 452.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Jane Knitzer & Merrill Sobie, LAW GUARDIANS IN NEW YORK STATE: A STUDY OF THE LEGAL REPRESENTATION OF CHILDREN (1984) [hereinafter LAW GUARDIANS].

⁹⁹ *Id.* at 8.

¹⁰⁰ *Id.* at 9.

¹⁰¹ *Id.* at 41.

In response to growing evidence that children were not receiving adequate representation in child protection proceedings, the federal government authorized several evaluations to determine the effectiveness of guardian ad litem representation. CSR, Inc. conducted the first study, the *National Evaluation of the Impact of Guardians Ad Litem in Child Abuse and Neglect Proceedings*, in 1988.¹⁰² The following year, Congress directed the National Center on Child Abuse and Neglect to commission another evaluation of guardian ad litem programs.¹⁰³ This mandate resulted in two studies that the American Bar Association Center for Children and the Law conducted: the first, the *National Study of Guardian Ad Litem Representation*, was published in 1990;¹⁰⁴ the second, the *Final Report on the Validation and Effectiveness Study of Legal Representation through Guardian Ad Litem*, was published in 1994.¹⁰⁵ At least three program models of guardian ad litem representation were identified in each of the reports: (1) the private attorney model, in which the court appoints an attorney in private practice to represent a child and provides the attorney compensation; (2) the staff attorney model, in which the court or city employs a staff of attorneys either directly or through contracts with law firms or the public defender's office; and (3) the Court Appointed Special Advocate ("CASA") model, in which lay volunteers are trained to advocate for children.¹⁰⁶ CASA volunteers may work, depending on the state, in conjunction with a program guardian ad litem attorney who provides legal consultation and presents the case to the court, independently from and in addition to a separately appointed guardian ad litem attorney, or as the child's sole guardian ad litem.¹⁰⁷

Echoing previous studies, both the *Final Report* and the *National Evaluation* identified numerous deficiencies in the representation of children in child protection proceedings.¹⁰⁸ Private attorneys were the primary transgressors, with data indicating that most did not sufficiently prepare their cases and with almost thirty percent reporting that they had no contact

¹⁰² NAT'L EVALUATION, *supra* note 4.

¹⁰³ Child Abuse Prevention, Adoption and Family Services Act of 1988, Pub. L. No. 100-294 (codified as amended, at 42 U.S.C. § 5101-5106 (1988 & Supp. 1993)).

¹⁰⁴ NAT'L STUDY, *supra* note 4.

¹⁰⁵ FINAL REPORT, *supra* note 4.

¹⁰⁶ See NAT'L STUDY, *supra* note 4; FINAL REPORT, *supra* note 4.

¹⁰⁷ FINAL REPORT, *supra* note 4, at 2-11.

¹⁰⁸ NAT'L STUDY, *supra* note 4, at 41; FINAL REPORT, *supra* note 4, at 5-15. According to judges' assessments, only 30% of the private attorneys were deemed effective in performing their duties, while 53% of staff attorneys were effective and 72% of CASA volunteers were very effective. *Id.*

or limited contact with their child clients.¹⁰⁹ Staff attorneys, while performing better than the private attorneys, also fell short of acceptable standards of representation. The *National Evaluation* concluded that the CASA model “clearly excelled as a method of guardian ad litem representation and produced the greatest number of outcomes in their child client’s best interests.”¹¹⁰ CASA volunteers were highly rated by professional respondents and network interviews revealed outstanding performances by the volunteers.¹¹¹ The CASA volunteers conducted extensive investigations, monitored the case closely, developed good relationships with their child clients, and were the most effective in ensuring the family was receiving services that would lead to family reunification.¹¹²

In 1997, the Washington State Legislature funded an evaluation to determine the effectiveness of the CASA program in improving outcomes for dependent children and to examine cost effectiveness.¹¹³ At the time of the evaluation, CASA volunteers in Washington were serving as guardians ad litem in twenty-two of thirty-two court jurisdictions; paid guardians ad litem were also used for some cases in all counties and not all children were represented.¹¹⁴ The research team concluded that the programs and their volunteers enjoyed widespread support, contributed an independent and valuable perspective on behalf of children, and consistently conducted investigations and monitored cases in the manner that was expected, thereby fulfilling their mandate.¹¹⁵ Survey respondents overwhelmingly preferred to work with cases that included a CASA volunteer, and preferred CASAs over paid guardians ad litem.¹¹⁶ The CASA volunteers were seen as making a unique and valuable contribution to the controversy in most cases and in

¹⁰⁹ *Id.* at 5-5. Private attorneys reported that they extensively prepared for 42.3% of their cases, as compared to 71.2% of CASA volunteers and over 60% of staff attorneys. *Id.* Only 17% of the staff attorneys and 9% of the CASA volunteers had no contact with their child clients. *Id.* at 5-13.

¹¹⁰ See NAT’L EVALUATION, *supra* note 4, at 18.

¹¹¹ *Id.*

¹¹² *Id.* There appears to be two reasons for the effectiveness of CASA models: personal motivation of the volunteers and low caseloads. CASAs are interested and committed to their work. They spend considerable time on their cases without any monetary compensation and are willing to remain involved over extended periods of time. The reasons they gave for their commitment in the network interviews—interest in children, the desire to improve the system and make an impact on a child’s life—suggest strong personal motivations. *Id.*

¹¹³ WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, COURT APPOINTED SPECIAL ADVOCATES FOR CHILDREN IN WASHINGTON STATE: A REVIEW OF EFFECTIVENESS (1998).

¹¹⁴ *Id.* at 3.

¹¹⁵ *Id.* at 1. Researchers faced great difficulties in measuring effectiveness because in many cases, CASA programs are assigned the most serious and difficult cases, thus the outcomes cannot be fairly compared to children in more benign circumstances. *Id.* at 3.

¹¹⁶ *Id.* at 30 (surveying persons who were knowledgeable about or worked in conjunction with the program to assess program effectiveness).

bringing a fresh, outside perspective.¹¹⁷ The study also noted that the programs are a relatively inexpensive method of providing representation; paid representation that reflected an equivalent number of hours invested would clearly be far more costly.¹¹⁸ Overall, the results reflected widespread support.¹¹⁹

The results of the most recent evaluation of CASA representation, a study by Caliber Associates, were reported at the 2004 National CASA Conference.¹²⁰ The study found that CASA volunteers were highly effective at making recommendations to the court, and spent the largest part of their time in contact with the child.¹²¹ In addition, children with CASA volunteers, as well as the children's parents, received more services.¹²² The CASA volunteers were reported as well educated and likely to be employed and their recommendations to the court were very often accepted.¹²³ Despite the numerous and varied evaluations reporting the effectiveness of the CASA as guardian ad litem, and even though the appointment of an attorney guardian ad litem clearly does not guarantee quality advocacy for the child's interests, CASA volunteers are not uniformly used throughout the country in abuse and neglect proceedings.

Although all states currently provide for the appointment of guardians ad litem in child protection proceedings through statute, regulation, or court practice,¹²⁴ the National Study of Guardian Ad Litem Representation found

¹¹⁷ *Id.* at 4. There was some skepticism voiced for the CASAs functioning as experts in court proceedings, and a strong message from judges and lawyers that CASAs should have legal representation in court. *Id.* at 35.

¹¹⁸ *Id.* at 5. This evaluation, however, could not demonstrate that the appointment of a CASA produced any savings in state cost with regard to dependent children. *Id.* In 2003, CASA volunteers contributed ten million hours of advocacy for children. If compensated, the total would be more than \$496 million. Nat'l CASA Ass'n Annual Local Program Survey (2003).

¹¹⁹ WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, *supra* note 113, at 40.

¹²⁰ CALIBER ASSOCIATES, EVALUATION OF CASA REPRESENTATION FINAL REPORT (2004). Included in the study were data from 25 programs and data from the National Survey of Child and Adolescent Wellbeing, sponsored by the Children's Bureau. *Id.* at 10. Caliber Associates, Inc., an employee-owned consulting firm, provides research and consulting services that help clients develop and manage effective human services programs and policies for the public good. They work in partnership with public, private and nonprofit clients to increase their knowledge base, support program development, enhance program operations, evaluate results and create sustainable systems. *About Caliber*, Oct. 10, 2005, <http://www.caliberws@caliber.com>.

¹²¹ *Id.* at 46.

¹²² *Id.* at 26-27. Seventy-three percent of services ordered were received.

¹²³ *Id.* at 14. More than half of the volunteers (63%) worked. Approximately 87% had some college, had completed college or had a graduate degree. *Id.* Mean number of accepted recommendations was 28 and the mean number of rejected recommendations was 4. *Id.* at 30.

¹²⁴ The CASA program's legal sanction may be derived from state law, executive or judicial order, or court rules. Each local program has legal authority to operate as a non-profit agency, incorporated in the state in which it operates, with a charter or constitution and bylaws or as a publicly administered

that in some court systems there was a “persistent disregard of Federal (and often State) legislative intent” and that the congressional mandate for guardian ad litem representation had not been met in an adequate fashion.¹²⁵ For example, in eight states, appointment of a guardian ad litem is discretionary or required only in some cases, resulting in a substantial number of children in these states being unrepresented.¹²⁶ Even in those states requiring the appointment of guardians ad litem in child protection proceedings, many children are still not represented.¹²⁷ Those children who were represented often reported infrequent and last-minute meetings with attorneys who appeared to be unfamiliar with their case or the current circumstances of their lives.¹²⁸

Even with the active participation of children and families, attorneys will not always have the time and resources to provide the in-depth information needed for the judge to make fully informed decisions.¹²⁹ Therefore, it is critical that children of all ages have a skilled and knowledgeable advocate in all legal proceedings. As the studies discussed above have shown, comprehensive adoption of the CASA model would provide the most successful and effective advocacy for children. These volunteers have the time, training, and commitment to listen carefully to children and to the adults

program authorized and established by statute. CASA Program Standards, CASA Program Mission and Purpose 2 (2004).

¹²⁵ NAT'L STUDY, *supra* note 4 (evaluating the quality and effectiveness of GAL representation).

¹²⁶ *Id.* at 9. In Arkansas, appointment of a GAL is required only if custody is in question. Georgia, Louisiana and Wisconsin require appointment only in termination of parental rights cases. Georgia law also mandates appointment when the child has no parent and Wisconsin requires representation when the child is removed from the home or in cases involving custody or abuse restraining orders. Indiana requires GAL appointment in cases of termination of parental rights, Fetal Alcohol Syndrome, drug-addicted newborns and whenever an abuse or neglect petition is contested. In Colorado, GAL representation is mandatory in abuse cases but discretionary in neglect cases. In Delaware, Indiana and Texas, appointment of a GAL is completely at the discretion of the presiding judge. *Id.*

¹²⁷ *Id.* at 11-14. Alabama, Alaska, Connecticut, District of Columbia, Hawaii, Illinois, Iowa, Kansas, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Rhode Island, South Carolina, Vermont, West Virginia, and Wyoming report that 100% of abused and neglected children are represented. Arizona, Arkansas, Colorado, Maine, Minnesota, Mississippi, North Carolina, Ohio, Texas, Utah, Virginia, and Wisconsin estimated that 90% or more of abused and neglected children in courts were represented. Georgia, Kentucky, Pennsylvania, South Dakota, Tennessee, and Washington estimated over 80% of the children were represented. California and Indiana estimated 78% of the children were represented. Oregon estimated 69% were represented. Idaho estimated that 60% were represented. Louisiana estimated 54% were represented. Florida estimated 49% were represented. Nevada estimated 32% and Delaware estimated the lowest number of abused and neglected children being represented at 22%. *Id.*

¹²⁸ A. Moynihan et al., *Fordham Interdisciplinary Conference Achieving Justice: Parents and the Child Welfare System*, 70 *FORDHAM L. REV.* 287, 290 (2001) (noting that children were not always present in court and often unaware that court proceedings were underway).

¹²⁹ Pew Commission, *supra* note 61, at 9.

who care for them.¹³⁰ Today there are more than 950 CASA programs operating in the United States.¹³¹ Almost 60,000 women and men served as CASA volunteers in 2005.¹³² These volunteers spoke for an estimated 230,000 abused and neglected children in court.¹³³

The Office of Juvenile Justice and Delinquency Prevention views CASA not only as a safety net for abused and neglected children, but also as an essential ally in delinquency prevention.¹³⁴ These children, often shuttled from home to home, are at increased risk of repeating the same violent behavior they experience, and therefore at risk of becoming delinquents and adult criminals.¹³⁵ The CASA system interrupts this cycle. When CASA's involvement in a child's case prevents later juvenile delinquency and placement, the investment in CASA representation for that one child will have paid off forty times over.¹³⁶ By helping to reduce time spent unnecessarily in foster care, CASA can also reduce child welfare costs. If the median length of stay in foster care was shortened for CASA children by just one month, it would create a savings of approximately \$1.3 billion.¹³⁷

CASA administrators cite inadequate funding as the primary reason that CASA programs do not exist in every judicial district.¹³⁸ CASA programs are supported by a mix of private, local, state, and federal funding.¹³⁹ Nationally, federal support for CASA programs is less than 10% of revenue for local programs.¹⁴⁰ CASA's cost per child served in a suburban area is \$820; therefore in order to serve the remaining 262,000 children in foster care without CASA advocacy would require an estimated \$214,840,000.¹⁴¹ The first step to establishing CASA programs in every judicial district is to

¹³⁰ *Id.* at 43.

¹³¹ 2004 Nat'l CASA Assoc. Annual Local Program Survey, http://www.casenet.org/download/casa-surveys/0511_2004_annual_local_progam_survey_0024.pdf.

¹³² Piedmont CASA, About Us, <http://avenue.org/casa/aboutus.htm> (last visited May 10, 2006).

¹³³ *Id.*

¹³⁴ J. Robert Flores, Office of Juvenile Justice and Delinquency Prevention, A Tribute to Court Appointed Special Advocate Volunteers Bulletin (2004) [hereinafter OJJDP Bulletin].

¹³⁵ *Id.* Children who suffer abuse or neglect are 53% more likely to become juvenile delinquents, 38% more likely to be arrested as adults, and 38% more likely to become violent criminals. *Id.*

¹³⁶ *Id.*

¹³⁷ E-mail from Carmela Welte, Deputy Chief Executive Officer, Nat'l CASA Ass'n, to Hollis Peterson, Student, George Mason Univ. School of Law (Jan. 8, 2005 08:10 CST) (on file with author).

¹³⁸ Telephone Interview with Carmela Welte, Deputy Chief Executive Officer, Nat'l CASA Ass'n (July 13, 2004); Telephone Interview with Jean Hawley, 4th Judicial Dist. CASA Adm'r (July 12, 2004).

¹³⁹ Telephone Interview with Carmela Welte, Deputy Chief Executive Officer, Nat'l CASA Ass'n (July 13, 2004).

¹⁴⁰ *Id.*

¹⁴¹ E-mail from Carmela Welte, Deputy Chief Executive Officer, Nat'l CASA Ass'n, to Hollis Peterson, Student, George Mason Univ. School of Law (July 8, 2004, 03:59 CST) (on file with author).

secure judicial support. Increased and continued funding is necessary to expand the services of CASA advocacy to all children in communities where a CASA program is already established. Reaching National CASA's goal of providing a volunteer to every child in need will take time, money, and effort. In the meantime, many guardians ad litem are left to advocate for children without the invaluable assistance of a CASA volunteer.

IV. IN THE ABSENCE OF A COURT APPOINTED SPECIAL ADVOCATE: WHAT UNASSISTED GUARDIANS AD LITEM NEED TO KNOW

Attorney competence is required in all types of representation, and competent representation requires both an understanding of the area of law involved and specialized knowledge in regards to the client.¹⁴² Children do not function like adults, and their understanding of the legal system changes throughout their developmental life.¹⁴³ The first duty of the child advocate, therefore, should be to learn about children and families. This duty becomes especially important for the attorney representing an abused or neglected child without the assistance of a CASA. Attorneys in this area confront an array of issues not addressed in law school: interviewing children, chemical dependency, domestic violence, cultural diversity, and the effects of child abuse. These advocates need a basic understanding of child development and an appreciation of children's needs at each developmental stage. For those attorney guardians ad litem who practice in a judicial district without a CASA program, the following information provides a brief overview of some of the most important topics in child representation.

¹⁴² See MODEL RULES OF PROF'L CONDUCT R. 1.1 (1995) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."). The Comment to this rule addresses the factors for determining knowledge and skill, including "the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter . . ." *Id.* R. 1.1 cmt. 1 (1995). The Model Code of Professional Responsibility provides that a lawyer shall not handle a matter "which he knows or should know he is not competent to handle, without associating with him a lawyer who is competent to handle it." MODEL CODE OF PROF'L RESPONSIBILITY DR 6-101 (A)(1) (1969).

¹⁴³ JOHN MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES § 1.9 (2d ed. 1992).

A. *Understanding Children and Families*

All children need safe, permanent families that love, nurture, protect, and guide them. To develop into functional, emotionally stable adults, they need that unique sense of belonging that comes from being part of a family and a connection to their cultural heritage.¹⁴⁴ In determining what is in the child client's best interests, the guardian ad litem has the difficult task of deciding who can best meet the needs of the child, which requires an objective, systematic examination of each child's situation, as well as an awareness and understanding of the factors that influence a family.¹⁴⁵ Changes in the American family since the 1970s have included "high family mobility, a high divorce rate, two working parents, an increase in out-of-wedlock childbirths, substantial co-habitation, and an increase in single parents raising children."¹⁴⁶ These statistics provide sound explanation for the increasing numbers of abuse and neglect proceedings.¹⁴⁷ In order to be effective, guardians ad litem must educate themselves as to the family system, the conditions that may lead to abuse or neglect, the impact of mental illness on children and families, the effects of substance abuse on parenting and the child's experiences, domestic violence issues, and how socioeconomic status impacts children and families.¹⁴⁸ In addition, they must realize how their own personal values and biases can affect objectivity.¹⁴⁹

A sound working knowledge of child and adolescent development is also essential to representing children. Such knowledge allows attorneys to

¹⁴⁴ NAT'L COMM'N ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES xix (1991).

¹⁴⁵ NAT'L COURT APPOINTED SPECIAL ADVOC. ASS'N, *supra* note 19, at 1-9 (recognizing the impact of stress, culture, mental illness, abuse, domestic violence, poverty, and personal values). See also Press Release, HHS, Dep't of HHS Survey Shows Dramatic Increase in Child Abuse and Neglect, 1986-1993, (September 18, 1996). The third National Incidence Study of Child Abuse and Neglect found that:

Children from families with incomes below \$15,000 were more than 22 times more likely to experience maltreatment than children from families whose incomes exceed \$30,000. They also were more 18 times more likely to be sexually abused, almost 56 times more likely to be educationally neglected and more than 22 times more likely to be seriously injured.

Id.

¹⁴⁶ H. HACKNEY, CHANGING CONTEXTS FOR COUNSELOR PREPARATION IN THE 1990S 20 (1990) (discussing the family system and how societal changes affect the Model of Marital and Family Systems).

¹⁴⁷ S. Allen Wilcoxon, *Healthy Family Functioning: The Other Side of Family Pathology*, J. COUNSELING & DEV., 63, 495-499 (1985).

¹⁴⁸ See NAT'L COURT APPOINTED SPECIAL ADVOC. ASS'N, *supra* note 19, at Chapters 4-5 (specifying conditions associated with the mentioned issues).

¹⁴⁹ *Id.* at 5-11.

develop reasonable expectations for their clients¹⁵⁰ and gives guardians ad litem insight into the child's difficulty in comprehending questions, recalling information, distinguishing facts from fantasy, and expressing themselves.¹⁵¹ Such knowledge assists the guardian ad litem in determining whether the child is able to testify, and the weight the court should give to their testimony.¹⁵² The Model Rules of Professional Conduct's Comment to Rule 1.14 recognizes the value of the child client's input and further recognizes that varying degrees of input from children at different developmental stages may occur.¹⁵³

To advocate for a child, the guardian ad litem must also keep the child's needs clearly in mind. Children's needs depend on their age, stage of development, attachment to their family, and reaction to what is happening around them.¹⁵⁴ When children's needs are met appropriately, they are able to grow and develop optimally.¹⁵⁵ It is important that a guardian ad litem be able to assess age-appropriate behavior for children from birth through adolescence and to know how children grow and develop, physically, cognitively, and psychologically.¹⁵⁶ It is vitally important for the guardian ad litem to recognize the responsibility that she has to educate herself in these matters. Without in-depth understanding of these issues, guardians will lack the essential background needed to fully consider some of the most important factors in their decision-making process.

In every case, the guardian ad litem should consider the child's sense of time.¹⁵⁷ The system tends to move slowly and it is often the guardian

¹⁵⁰ MYERS, *supra* note 143, at § 1.2 (noting that overestimating or underestimating your child-client's abilities can damage the effectiveness of representation).

¹⁵¹ Ventrell, *supra* note 12, at 273 (highlighting the importance of understanding child development from a psychological perspective).

¹⁵² *Id.*

¹⁵³ The Comment to Rule 1.14 states:

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.

MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. (2002).

¹⁵⁴ See ERIK H. ERIKSON, *IDENTITY, YOUTH, AND CRISIS* 120 (1968).

¹⁵⁵ *Id.*

¹⁵⁶ NAT'L COURT APPOINTED SPECIAL ADVOC. ASS'N, *supra* note 19, at 5-27.

¹⁵⁷ ILL. ADMIN. CODE tit. 89, § 315.60(a) (2006). "The Department recognizes that children have a different sense of time than adults. What seems like a short family disruption or a brief separation to adults may be a very painful and intolerably long period for children. In general, younger children are less able to tolerate periods of separation than older children." *Id.*

who makes the most compelling argument for moving quickly to achieve permanence for the child.¹⁵⁸ Even when litigation proceeds at what attorneys and judges regard as a normal pace, children often perceive the proceedings as extended for vast and indefinite periods.¹⁵⁹ Court delays caused by prolonged litigation can be especially stressful to abused and neglected children. The uncertainty of not knowing whether they will be removed from home, whether or when they will go home, when they might be moved to another foster home, or whether and when they will move to a permanent home is frightening.¹⁶⁰ Integrating an understanding about separation with information on child development, behavior, attachment, and a child's sense of time allows the guardian ad litem to more accurately assess a child's needs and make sound recommendations to the court.

B. *Effective Communication and Problems of Confidentiality*

A guardian ad litem will communicate during the course of an investigation with many people. Developing relationships based on respect and credibility will assist the guardian ad litem in doing her job. Respect is earned as others on the case see the guardian's commitment to the child and credibility is established when the guardian does what she says she will do in a timely manner, makes recommendations built on well-researched and independently verified information, and maintains the proper role as the child's advocate.¹⁶¹ Understanding the basic elements of communication, especially in regards to children, can increase the guardian ad litem's skills in gathering the information needed to successfully advocate for the

¹⁵⁸ NAT'L COURT APPOINTED SPECIAL ADVOC. ASS'N, *supra* note 19, at 10-17. A parent may file for a continuance as a strategic maneuver or to delay what he or she sees as an inevitable loss of custody.

¹⁵⁹ Linda C. Mayes & Adriana Molitor-Siegl, *The Impact of Divorce on Infants and Very Young Children*, in *THE SCIENTIFIC BASIS OF CHILD CUSTODY DECISIONS* 188, 211 (Robert M Galatzer-Levy & Louis Kraus eds., 1999). The author observes that:

Most adults can easily recall that the experience of time is substantially different in childhood than it is in adult life. In particular, the passage of time during childhood seems far slower, so that a summer or an academic year seems to continue indefinitely and, when a child is distressed, even periods of an hour may seem interminable [T]he child's different experience of time should be a prime consideration.

Id.

¹⁶⁰ NAT'L COURT APPOINTED SPECIAL ADVOC. ASS'N, *supra* note 19, at 10-16. The GAL "should always push the judge to set the next court date as soon as is practical, guided by what needs to be accomplished prior to that date rather than what is convenient for the adults involved." *Id.* at 10-17.

¹⁶¹ *Id.* at 7-5 (stating that effective communication is critical to the GAL's ability to advocate for children).

child.¹⁶² Without this understanding, a guardian cannot adequately communicate with the child-client, and consequently cannot understand and protect the child's interests.¹⁶³

In order to be an effective advocate, the guardian ad litem must develop rapport with the child and earn his trust.¹⁶⁴ It is one of the guardian's most important responsibilities and the foundation of her relationship with the child.¹⁶⁵ The guardian can best assess what the child needs and what the child wants by establishing a relationship that allows the child to honestly share his feelings.¹⁶⁶ Some children may be reluctant to speak openly to the guardian ad litem because their parents have instructed them not to, they are generally distrustful of strangers, or perhaps because they are confused and hurt. In situations such as this, it is important for the guardian to actively listen to the child's words, observe their nonverbal clues, express a sincere interest in the child as a person, and encourage open channels of communication. It is also important for the guardian to show empathy, and to indicate that the child is being heard and understood.¹⁶⁷

Another particularly important skill for the guardian ad litem is interviewing the child. It is crucial that the guardian does not lead or influence the child through her line of questioning, and that she does not ask inappropriate questions, such as "Who do you love more, your mom or your dad?"¹⁶⁸ Equally important is how the guardian ad litem interprets the child's words and actions. Just because a child says he wants to live with

¹⁶² *Id.* at 7-7 (listing the channels of communication as verbal, nonverbal, and emotional, noting that the emotional channel is not easy to observe). GALs "practice the art of watching for wordless messages to see if the verbal and nonverbal messages match or are congruent Nonverbal communication incorporates cultural norms and actual body language. For example, the use of eye contact can convey different messages depending on a person's culture. In some cultures, a person who makes sustained direct eye contact is perceived as honest and forthright, while in some cultures this same behavior would be perceived as rude and disrespectful." *Id.* See also DERALD WING SUE & DAVID SUE, COUNSELING THE CULTURALLY DIFFERENT 51- 53 (2d ed. 1990).

¹⁶³ Ventrell, *supra* note 12, at 273.

¹⁶⁴ NAT'L COURT APPOINTED SPECIAL ADVOC. ASS'N, *supra* note 19, at 7-13.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 7-26. The GAL must be careful of incorrect assumptions and bring them out in the open so mistakes can be corrected. Using reflective listening, or stating back what you believe you heard, allows for better understanding.

¹⁶⁸ See ISOLINA RICCI, MOM'S HOUSE, DAD'S HOUSE: MAKING TWO HOMES FOR YOUR CHILD 137 (Simon & Schuster 1997) (1980) (noting that parents should not ask any child which parent they want to live with). Questions of this nature place the child in an impossible situation and create feelings of guilt. Though it may seem obvious that questions such as this should never be asked, they routinely are, as some GALs are looking for answers that make their decision easy and, having no training or experience in child psychology or counseling, do not understand the impact of such questioning on the child.

one caregiver over another, does not mean that this preference has developed without pressure, guilt, intimidation, or threat. The effective advocate will search below the surface of words to understand what motivates the child by identifying why the child feels the way he does. This type of questioning requires specific training and education in interview techniques and counseling and assists the guardian in making the child's involvement in the proceedings as painless as possible.

The problems of confidentiality between children and their guardians ad litem are directly related to the quality and effectiveness of the guardian's communication skills. The confidentiality of conversations between children and their guardian ad litem was not protected under the common law, nor is it today in most jurisdictions.¹⁶⁹ Effective guardians ad litem develop trusting relationships with their children, but it is doubtful that these children, on their own, understand that their words might be repeated and disclosed to or used against their parents or caregivers.¹⁷⁰ The guardian ad litem must consider the risk involved in warning their child client that their conversations might be disclosed, which is that such a warning might keep children from being completely honest and divulging important information.¹⁷¹ However, if the guardian ad litem does not warn the child that what he says may be repeated, and then divulges the child's secrets, there is a risk of psychological damage to the child from the violation of trust that could have lasting effects and impede any future therapeutic efforts.¹⁷²

It is appropriate for guardians to communicate to their child clients any plans they have to repeat statements made in confidence, giving great deference to the wishes of older children who ask them not to make such

¹⁶⁹ See, e.g., *State v. Good*, 417 S.E.2d 643, 645 (S.C. Ct. App. 1992) (holding that there was no privilege in the common law or statutes of South Carolina to prevent a guardian ad litem of two brothers from testifying that one of the children told him that his brother had the gun which was used to murder their father). See also Robert Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L.J. 203, 217 & n.40 (1992) (listing the states that require attorneys to report child abuse).

¹⁷⁰ See Daniel Coburn, *Child-Parent Communications: Spare the Privilege and Spoil the Child*, 74 DICK. L. REV. 599, 599 (1969-70).

¹⁷¹ The evidentiary principles protecting communications between two persons are exceptions to the rule admitting all relevant evidence. Fed. R. Evid., Arts. IV and V. Their creation represents a legislative determination that preserving or fostering certain relationships outweighs the potential benefit to the judicial system of compelled disclosure. *Id.* at 69, Report of House Committee on the Judiciary. Typically, the privileged relationship is a socially desirable one that requires confidentiality to function optimally. *Id.*

¹⁷² Roy T. Stuckey, *The Child-Parent Privilege: A Proposal*, 47 FORDHAM L. REV. 771, 771 (1979). By protecting communications made in confidence, a privilege both preserves the privacy of the instant relationship and encourages open communication between others involved in the same type of beneficial association. *Id.*

disclosures.¹⁷³ Allowing guardians ad litem to voluntarily disclose what their client has told them if they believe it would serve their client's best interests, but not forcing them to reveal anything which they believe might harm the children, frees guardians to pursue the best interests of their charges.¹⁷⁴ In deciding whether to disclose confidential information, the Model Rules of Professional Conduct should guide any such decisions.¹⁷⁵

V. SUGGESTIONS FOR MITIGATING THE DETRIMENTAL EFFECTS OF THE ADVERSARY SYSTEM ON CHILDREN

The adversarial process is hard on children.¹⁷⁶ Zealous advocacy heightens and prolongs conflict, as does delay in the system.¹⁷⁷ There is little doubt that the consequences of uncertainty and instability can devastate a child and affect functioning and performance in all areas, particularly the ability to form meaningful relationships as an adult.¹⁷⁸ In addition, children may also be subject to the whims of judges and attorneys who do not understand their needs because they lack the training or the time to resolve the case in a competent manner.¹⁷⁹ Furthermore, the stress placed on parents by the adversarial system may detract from the parent's ability to care for their children and drain resources that could otherwise be used for the chil-

¹⁷³ Stuckey, *supra* note 71, at 1801 (discussing whether guardians ad litem should be allowed to disclose voluntarily any secrets told to them by their wards).

¹⁷⁴ Stuckey, *supra* note 71, at 1800 (analyzing the philosophy that guardians ad litem should be viewed as surrogate parents and their functions in the legal system should be the same as those which good parents would serve in similar situations).

¹⁷⁵ Model Rules of Prof'l Conduct R. 1.6. A lawyer may reveal confidences to the extent necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

¹⁷⁶ John E.B. Myers, *The Legal Response to Child Abuse: In the Best Interest of Children?*, 24 J. FAM. L. 149 (1986).

¹⁷⁷ See Hugh McIsaac, *Reducing the Pain of a Child Custody Struggle*, Fam. Advoc., Spring 1992, at 26.

¹⁷⁸ See PANEL ON RESEARCH ON CHILD ABUSE AND NEGLECT, COMMISSION ON BEHAVIORAL AND SOCIAL SCIENCES AND EDUCATION, NAT'L RESEARCH COUNCIL, UNDERSTANDING CHILD ABUSE AND NEGLECT (1993) at 106-40 (finding that some of the long term consequences of child maltreatment include personal problems, such as isolation and fear of intimacy).

¹⁷⁹ See *In re David H.*, 39 Cal. Rptr. 2d 313 (1995) (finding after two years of delay and unsuccessful attempts at mediation that parental rights should be terminated even though no services were provided).

dren's needs.¹⁸⁰ Participating in evaluations or counseling further forces the child to take notice of the fact that he is engaged in a dispute.¹⁸¹ The guardian ad litem, by virtue of her role in the proceedings, is able to mitigate the effects of the adversarial system on the child.¹⁸² What follows are suggestions for what guardians could and should do to minimize the negative effects of the judicial process on children.

(1) Encourage the settlement of disputes through mediation and negotiation to prevent long, drawn-out, adversarial proceedings.¹⁸³ Take a strong stand against unnecessary continuances.

(2) Assume the role of counselor. Encourage agreement, avoid using threats, and approach negotiation in an objective, fair way.¹⁸⁴

(3) Adopt a preventative/therapeutic role that considers the welfare of the child and refuses to increase the emotional level of the dispute.¹⁸⁵

(4) Provide appropriate materials and advice to educate both the child and the parents about the detrimental effects of neglect or abuse.

(5) Provide the child and parents information about community or school-based support groups and with preventative coping and stress management strategies.¹⁸⁶

(6) Plan a strategy to promote stability in the child's social and emotional life by advocating, when appropriate, to keep the child in the same neighborhood, school, or church and following the same routine.¹⁸⁷

¹⁸⁰ Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 118 (1997).

¹⁸¹ Judith S. Wallerstein, *Children of Divorce: Preliminary Report of a Ten-Year Follow-Up of Young Children*, in READINGS IN FAMILY LAW: DIVORCE AND ITS CONSEQUENCES 77 (1990) (noting that in child custody matters, the conflict can distort the child's capacities for trust and self-integration).

¹⁸² Francis Catania, *Accounting to Ourselves for Ourselves: An Analysis of Adjudication in the Resolution of Child Custody Disputes*, 71 NEB. L. REV. 1228, 1233 (1992). The author suggests that a negotiation-based resolution system should be adopted. "The law should regard the family, at least insofar as it involves children, as a lifelong commitment. Such a view indeed succeeds in bringing relief and a happier outcome for the family." *Id.*

¹⁸³ Parents who resolve conflict through mediation remain more involved with their children, are more satisfied with the results, and are more likely to comply with court orders. Katherine M. Kitzman & Robert E. Emery, *Procedural Justice and Parents' Satisfaction in a Field Study of Child Custody Dispute Resolutions*, 17 LAW AND HUM. BEHAV. 553, 554 (1993).

¹⁸⁴ Richard E. Crouch, *The Matter of Bombers: Unfair Tactics and the Problem of Defining Unethical Behavior in Divorce Litigation*, 20 FAM. L.Q. 413, 420-31 (1996).

¹⁸⁵ KENNETH KRESSEL, THE PROCESS OF DIVORCE: HOW PROFESSIONALS AND COUPLES NEGOTIATE SETTLEMENTS 163 (1985). Kressel writes that "while the official code of conduct prescribes a zealous pursuit of the client's interests, the informal norms and realities of professional life prompt compromise and cooperation."

¹⁸⁶ Local Department of Social Services and public school offices should be able to provide information regarding community and school-based support groups.

(7) Give the child a developmentally appropriate description of the court process and participants, including a time line.¹⁸⁸ Paint a positive and realistic picture of the future.

(8) In a multicultural environment:

(a) Ask questions regarding certain behaviors, values, attitudes, and perspectives.

(b) Pay attention to any signs of spirituality or religiosity and respect the family's beliefs.

(c) Do not insist on eye-to-eye contact.¹⁸⁹

(d) Explain the need for any and all information requested and, if possible, delay asking the most personal questions until the family has had the time to understand the need for the information.

(e) Understand the importance of cultural dynamics between the child and family and the child rearing and disciplinary practices used in the child's culture.¹⁹⁰

(9) Understand the impact that abuse, neglect, divorce, parental separation, mental illness, domestic violence, substance abuse, and poverty have on children and families. Develop sound working knowledge of child and adolescent development. If necessary, seek expert advice.¹⁹¹

(10) Appreciate how personal values, biases, and experiences can affect objectivity regarding what would be in the child's best interests. Strive to remove such influences from your decision-making process.

¹⁸⁷ Kathryn E. Maxwell, *Preventive Lawyering Strategies to Mitigate the Detrimental Effects of Clients' Divorces on Their Children*, 67 REV. JUR. U.P.R. 137, 157, 159 (1998) (noting that the more stable a child's life is kept, the better adjusted he will be after divorce). However, a child's safety has to be the primary consideration. This means that sometimes the child must be moved for protection.

¹⁸⁸ Nancy E. Walker & Matthew Nguyen, *Interviewing the Child Witness: The Do's and the Don't's, The How's and the Why's*, 29 CREIGHTON L. REV. 1587, 1593 (1996). "Children have a right to know what will happen to them in legal proceedings, including interviews." *Id.* When children are lacking information, they tend to invent and adopt their own perceptions, which are often much worse than reality. *Id.* at 1598.

¹⁸⁹ See SUE & SUE, *supra* note 162, at 54-55. Kinesics, which includes facial expressions, posture, gestures, and eye contact, appear to be culturally conditioned, and have different meanings when the cultural context is considered. For white Americans, lack of direct eye contact could imply that the child is sullen, uncooperative, shy, or dishonest, but in other cultures the same behavior would be interpreted as a sign of respect and obedience. *Id.*

¹⁹⁰ See generally SUE & SUE, *supra* note 162 (providing a conceptual rationale for the need to develop culture-specific intervention strategies in cross-cultural counseling).

¹⁹¹ Weinstein, *supra* note 180, at 139. GALs should not assume that they alone possess all the knowledge necessary to make a recommendation to the court. This attitude demeans the other disciplines that participate in family law and child protection matters and leads to uninformed decisions that can have long lasting consequences.

(11) View the proceedings from the child's perspective, know the importance of permanence to the child and involve him in decisions when appropriate. Help him understand his rights, responsibilities, and what you see as best for him.

(12) Advocate for additional therapeutic services and utilize all available resources.¹⁹²

(13) Build a relationship with the child characterized by rapport and trust. Be honest in all communication with the child and clearly explain the limits of confidentiality.¹⁹³

(14) Discuss with the child any plans you have to repeat statements made in confidence, and when possible, give great deference to the wishes of older children who ask you not to make such disclosures. Only disclose confidences when necessary to advocate for the child's interests in the legal proceedings for which you have been appointed.¹⁹⁴

(15) Transmit positive regard, encouragement, and sincere interest. Be nonjudgmental and listen so that others can fully share and explain themselves and their situations. Always keep the lines of communication open and try to find creative solutions to problems.¹⁹⁵

CONCLUSION

Meaningful protection of children's rights requires that highly skilled, informed, and dedicated advocates represent children. Studies have shown that adopting the CASA model would provide the most successful and effective representation for children. CASA volunteers bring a much needed fresh perspective to our court and welfare systems, and are well equipped to identify the best interests of the child without having conflicting legal duties. The courts greatly benefit from the level of concern and commitment made by these volunteers, who do extraordinary work for children. In the absence of a CASA volunteer, the unassisted guardian ad litem attorney can minimize the negative effects of the judicial process on children by developing a sound working knowledge of issues involving children and families and following the aforementioned suggestions. This will ensure that the

¹⁹² KENDALL JOHNSON, *TRAUMA IN THE LIVES OF CHILDREN* 295 (2d ed. 1998) (listing resources for information and services relating to children in crisis).

¹⁹³ Walker & Nguyen, *supra* note 188, at 1593. "Recent research found that, when child-abuse interviewers spent adequate time on rapport-building activities, the first substantive open-ended question regarding abuse produced four times as much information as when inadequate time was spent on rapport-building." *Id.*

¹⁹⁴ See generally Stuckey, *supra* note 172.

¹⁹⁵ Walker & Nguyen, *supra* note 188, at 1591.

best interests of the child are more likely to be achieved through our legal system.

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